

DIGEST OF BUSINESS REVIEWS
2001

01-1 Arkansas Electric Cooperative Corporation 1/10/01

Electrical Power

Joint Marketing

Facts: Seventeen rural electric distribution cooperatives in Arkansas (“the Distribution Cooperatives”) propose to engage in the retail sale of electric power on a statewide basis through a joint selling agent. Under the selling agent’s operating agreement, the Distribution Cooperatives would conduct all of their retail marketing activities outside of their traditional territories through the energy service provider (the “ESP”). Should a Distribution Cooperative choose to withdraw from the ESP, the departing Distribution Cooperative would be free to compete with the ESP for any and all consumers. The combined generating power capacity of the Distribution Cooperatives is approximately six percent of the total generating capacity in the relevant retail electric power markets.

Response: It does not appear that the proposed formation of the joint retail marketing venture is likely to have any anticompetitive effects. Since the Distribution Cooperatives do not currently compete against each other in the generation or transportation of electric power, the proposed ESP is unlikely to have adverse effects on either the electric power generation or transportation markets in Arkansas. The Distribution Cooperatives’ relatively small size and lack of economies of scale make it unlikely that, on their own, they could successfully enter each other’s local retail markets. To the extent that the venture allows for an additional entrant into these retail markets not currently served by the Distribution Cooperatives, it could have procompetitive effects. The Department has no present intention to challenge the proposal.

Airline Services

Joint Marketing

Facts: Delta Airlines Inc. and Societe Air France propose the creation of a marketing joint venture for most of their international air cargo shipments that originate in the United States. Under the joint venture agreement, the parties will remain autonomous and will retain their respective independent decision making authority with respect to their passenger aircraft fleets. Delta and Air France presently have a combined share of the U.S.-to-Europe air cargo market of between 12.1 and 12.7 percent and face significant existing competition. Delta and Air France claim that the joint venture will offer customers access to a larger, combined cargo network, permit the companies to augment their air cargo services, and reduce the cost of that service.

Response: It does not appear likely that the parties' proposed air cargo joint venture will have anticompetitive effects. The U.S.-to-Europe air cargo market is relatively unconcentrated with no significant barriers to entry. The joint venture will continue to face considerable competition. To the extent that the joint venture provides customers with more flexible or efficient services, it could have a procompetitive effect. The Department has no present intention to challenge the proposal.

Trucks

Information Exchange

Facts: Truckload Carriers Association (“TCA”) and its members propose to develop a “benchmark project” to help identify the lowest cost or other best-performance measures in various management and operations areas. TCA is the national trade association of for-hire motor carriers that haul freight in full truckloads. This is a highly competitive and unconcentrated industry in which the 10 largest firms account for only 7 percent of industry revenues. To obtain relevant cost and other performance information, TCA proposes to identify through questionnaires, surveys, and discussions the areas which would be most useful for it to review. The results of the surveys would be available in aggregate form for purchase. TCA would also host periodic meetings of Best Practice Discussion groups to gain insights from the top performances shown in the surveys and to consider recommending particular practices. An antitrust attorney would monitor all meetings. The use of any information would be left to the unilateral voluntary decision of each participant.

Response: The fact that the information to be exchanged in the project will deal with costs, and that the procedures for collecting and disseminating the information will be subject to detailed prophylactic measures, makes it unlikely that the proposed conduct will raise prices, reduce output, or cause other harm to competition. In addition, the open procedures and voluntary nature of use of the developed information would seem substantially to reduce concerns over the Best-Practice recommendations. To the extent that resulting cost savings are passed on to customers, the benchmarking project may have procompetitive effects. The Department has no present intention to challenge the proposal.

Shipping

Common Billing Agent

Facts: Transportation Services, Inc. (“TSI”) proposes to establish a corporation that would act as a common billing and collection agent for its customers — ocean carriers in the U.S.-Puerto Rico trades. The corporation to be established would be independent of its customers, and its purpose would be to help carriers collect “detention and demurrage” charges, i.e., fees charged by carriers to customers who retain the carriers’ shipping containers beyond a previously agreed-upon period of time. Since customers are free to switch between carriers, they may do so in an attempt to avoid paying detention and demurrage charges. The corporation will collect and publish the names of customers who have failed to pay their detention and demurrage charges as required, including the amount of the delinquency and the number of days the payment is past due. Ocean carrier customers will then be able independently to develop and implement their own credit and collection policies with respect to firms listed as delinquent. The joint collection agent will not act as a conduit for the exchange of competitively sensitive information between its carrier customers.

Response: So long as the information exchanged is restricted to that which involves payment delinquencies in the manner described, TSI’s activities should not reduce carrier rivalry with respect to non-credit terms. And so long as TSI does not directly or indirectly urge or effectuate the concerted adoption of credit policies by its carrier customers, competitive options with respect to credit terms should not be reduced. The Department has no present intention to challenge the proposal.

Promotion Marketing

Information Exchange

Facts: Promotion Marketing Association (“PMA”) proposes the expansion of a previously approved information-sharing exchange designed to reduce rebate fraud. See Business Review letter 95-10, issued July 18, 1995. PMA would add mail-order firms to the existing exchange program in an attempt to reduce mail-order fraud, i.e., false claims that mailed merchandise was not received. PMA would use an existing centralized database, to which participating firms could report evidence of suspected mail-order fraud. The database manager would collect the evidence and report findings to law enforcement officials and, in aggregated form, to its members. To prevent the proposed information exchange from having any anticompetitive effects, PMA would impose a number of limitations on the exchange. The only information shared by the participating firms would be data compiled by the central database concerning individual abusers. The PMA will only provide its members with aggregated information about abuse and abusers. There would be no compilation of data concerning companies’ sales activities. In addition, each company that subscribed to the service would remain free to act or to not act as it deemed appropriate.

Response: To the extent that the information exchanged is limited as proposed, the information exchanged should not have any anticompetitive effect. The limited nature of the proposed cooperation should preclude any risk of concerted pricing or collective refusals to deal. To the extent that the proposed information sharing reduces fraud costs to mail-order manufacturers, PMA’s proposal may have procompetitive effects, reducing prices and expanding outputs to the benefit of consumers. The Department has no present intention to challenge the proposal.

Medical Equipment

Joint Marketing

Facts: Olympus America Inc. ("OAI") and C.R. Bard Inc. ("Bard") proposed a dealer and sales agency agreement for their sales of endoscopy accessory products ("EAP's) in the United States. EAPs are medical instruments used with endoscopes and video systems to examine the upper and lower digestive tracks and the bronchial trees of patients. OAI sells both a limited line of EAPs and other endoscopy equipment manufactured by its parent company. Bard manufactures and sells a full range of EAPs but does not sell other endoscopy equipment. Under the proposed agreement, Bard is designated as the exclusive dealer for the sales of Olympus-branded EAPs, and OAI will become a non-exclusive sales agent of Bard for both Olympus-branded and Bard-branded EAPs. The sales force of each party will sell the full line of all Olympus-branded and Bard-branded EAPs, and will be compensated under commission structures that provide equal financial incentives to sell both brands. OAI and Bard will each be entitled to a share of any incremental revenue that its sales force generates from sales of the other company's EAPs.

Response: The proposed collaboration economically integrates the sales forces of the companies in a manner that could produce procompetitive benefits that OAI and Bard could not produce separately and thus warrants a Rule-of-Reason analysis. The only EAPs sold by both OAI and Bard are biopsy forceps, which come in two varieties -- disposable and reusable. Nearly all of the biopsy forceps sold by OAI are reusable, while virtually all the biopsy forceps sold by Bard are disposable. Whether the disposable and reusable biopsy forceps are in the same or separate markets, the proposed collaboration does not raise market power concerns. Even if reusable and disposable biopsy forceps are in a single market, the parties' combined shares of all reusable and disposable biopsy forceps do not appear to be significantly above the twenty percent "safety zone" for competitor collaborations established by the Antitrust Guidelines for Collaborations Among Competitors, issued by the Federal Trade Commission and the U.S. Department of Justice in April 2000. Based on this analysis, the proposed marketing and sales agreement is not likely to result in anticompetitive harm, and could generate procompetitive efficiencies benefitting consumers. The Department has no present intention to challenge the proposal.

01-7 Rio Grande Eye Associates, P.A.

8/29/01

Health Care
Medical Services

Physician Network Joint Venture

Facts: Rio Grande Eye Associates proposed to establish a network of ophthalmologists in the El Paso, Texas, area to provide ophthalmologic services at reduced prices to managed care plans and other third-party purchasers of these services. The network will be non-exclusive, leaving its member ophthalmologists free to compete with the network, both individually and by joining other networks. The network will implement a 20% withhold arrangement, and the member ophthalmologists will share substantial financial risk. In addition, the network will be non-exclusive and will constitute less than 30% of the ophthalmologists in the El Paso, Texas, area.

Response: It appears that the network's proposed operations fall within the Antitrust Safety Zone for non-exclusive physician joint ventures under the Statements of Antitrust Enforcement Policy in Health Care, and it does not appear that the network's operations are likely to lessen competition substantially. The Department has no present intention to challenge the proposal.

Towing and Barge Services

Information Exchange

Facts: Foss Maritime Company and nine other towing and barge service firms proposed an exchange of certain historical cost information so that each company could better identify those areas in which it had the greatest potential to reduce costs, improve efficiency, and improve the quality and value of its service. The exchange was designed to conform with Statement 6 of the Joint DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care, “Antitrust Safety Zone: Exchanges of Price and Cost Information Among Providers That Will Not Be Challenged, Absent Extraordinary Circumstances, By The Agencies.” Information would be submitted to an independent third party that would compile the data and distribute a statistical analysis to the companies. All data submitted by the companies would be more than three months old at the time the results are disseminated. Pricing information would not be included in the survey, nor would any data of any kind be exchanged directly between or among individual companies.

Response: So long as the information is exchanged in accordance with the limitations discussed, the proposed exchange should not have any anticompetitive effects. The use of any “best practice” that is identified will be voluntary. Furthermore, the limited nature of the proposed cooperation — exchanging historic cost information on an aggregated basis with no discussion of pricing or other sales related conduct — should limit any risk of concerted pricing. The Department has no present intention to challenge the proposal.

01-9 Association of Fund-Raising
Distributors and Suppliers

12/21/01

Product Ordering Formats

Standards Program
Trade Association

Facts: The Association of Fund-Raising Distributors and Suppliers (“AFRDS”) proposes to establish uniform product ordering formats for products sold to non-profit organizations for resale in their fund-raising activities. AFRDS would establish a program designed to reduce ordering errors and to make it more efficient for distributors to deal with a greater number of suppliers. A possible outcome would be an eight-digit numeric code with the first three digits identifying the supplier company and the remaining five digits identifying the specific product item. All distributors, without regard to membership in AFRDS, would have access to the information; indeed, the series of numbers assigned to supplier companies would be public information, posted on the AFRDS web site. Supplier companies would still be responsible for applying specific codes to individual product items and for making the information available to their own customers through normal channels.

Response: Since the information to be exchanged in the development of the program will not contain pricing or other competitively sensitive information, it is unlikely that the program will diminish rivalry. Furthermore, the fact that all suppliers and distributors will have voluntary access to the program makes it unlikely that the program will unduly favor any supplier or group of suppliers. To the extent that the proposed program will reduce ordering error and enable distributors to deal with a larger number of suppliers, it could have a procompetitive effect. The Department has no present intention to challenge the proposal.